

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

JEAN M. FRANCHI
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-409
Case No. 78-6002

S.S.A. No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. OAK-14783

Following issuance of a decision by the administrative law judge on August 10, 1978 which reversed a Department determination that the claimant was ineligible for full weekly benefits under section 1253.5 of the Unemployment Insurance Code, this Board on September 5, 1978 removed the proceedings to itself for review and decision under section 413 of the Code.

The claimant has been an employee of the Employment Development Department and its predecessors since 1954. She suffered heart attacks in 1972 and 1973, and since 1973 has been restricted by her physician to three days of work per week. As the claimant's employer, the Department has accommodated the claimant in this restriction, and since 1973 has generally scheduled her to work three days per week, although she is occasionally called upon to work an additional half day, and rarely works an additional full day.

The claimant is an Employment Claims Assistant, which is an intermittent, rather than a full-time, position. As an intermittent employee the claimant was laid off for lack of work on June 12, 1978, and on June 19, 1978 filed a claim for benefits, establishing a benefit year beginning June 18, 1978 and a weekly benefit amount of \$69. The Department determined that the claimant was

able to work and available for work within the meaning of section 1253(c) of the code, but that the weekly payment due the claimant was subject to the provisions of section 1253.5 of the code and she was entitled to only 3/7ths of her weekly benefit amount. The claimant was given a waiting period credit for the week ending June 24, 1978 and received reduced benefits for the week ending June 30, 1978. Thereafter, she was recalled to work by the Department.

The claimant contends that the provisions of section 1253.5 of the code are operable only when a claimant is unable to work on a particular day or days of a week due to illness or injury, and were not applicable to her case. Her appeal from the Department's contrary determination was upheld by the administrative law judge.

REASONS FOR DECISION:

Subdivision (c) of section 1253 of the Unemployment Insurance Code provides as follows:

"An unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if the director finds that:

* * *

"(c) He was able to work and available for work for that week."

Section 1253.5 of the Unemployment Insurance Code provides:

"Notwithstanding the provisions of subdivision (c) of Section 1253, if an individual is, in all other respects, eligible for benefits under this part, and such individual becomes unable to work due to a physical or mental illness or injury for one or more days during such week, he shall be paid unemployment compensation benefits at the rate of one-seventh the weekly benefit amount payable for that week for each day which he is available for work and able to work. The

amount of benefits payable, if not a multiple of one dollar (\$1), shall be computed to the next higher multiple of one dollar (\$1). The individual shall not be entitled to unemployment compensation benefits for any day during such week which he is unable to work due to such physical or mental illness or injury." (Emphasis added)

The Department's position is that section 1253.5 applies to any claimant whose health does not permit him to work every day of the week. As already indicated, the claimant interprets section 1253.5 to be applicable only to claimants who are unable to work on particular days of the week because of illness or injury.

The work restriction imposed by the claimant may fairly be ascribed to "illness," as that word is used in section 1253.5. Webster's Third New International Dictionary defines illness as "an unhealthy condition of the body or mind." Stedman's Medical Dictionary, 21st Edition, defines illness as "disease," which is in turn defined as "an interruption or perversion of function of any of the organs; an acquired morbid change in any tissue of an organism." The claimant's heart condition is within the scope of both of these definitions. Even so, we are persuaded that the interpretation of section 1253.5 put forward by the claimant is correct.

In interpreting a statute, it is presumed that every word was intended to have some meaning and perform some useful office, and a construction implying that words were used in vain, or that they are surplusage, is to be avoided. (45 Cal. Jur. 2d, Statutes, § 117, pp. 626-627) The joining of the verb "becomes" with the expression "unable to work" is significant, indicating that the inability to work contemplated is of the kind which results from a change in physical or mental disorder rather than a chronic condition. The omission of the verb "becomes" in the last sentence of section 1253.5 is not significant in the light of its use in the first sentence. It is a rule of statutory construction that seemingly conflicting or inconsistent provisions should be reconciled wherever possible, and that to achieve this objective words or clauses may be enlarged or restricted by other words in the same statute. (45 Cal. Jur. 2d, Statutes, § 118, p. 627) Moreover, because section 1253.5 is a limitation

upon section 1253(c) and assumes that the claimant may not be ineligible under that section, it is clear that the inability to work contemplated by section 1253.5 is temporary, rather than permanent.

We conclude that section 1253.5 was not intended to apply to persons able to work on any day of the week but not all, and whose inability to work on every day of the week is attributable to a permanent health condition.

The foregoing conclusion is consonant with the prescript of the courts that the Unemployment Insurance Code is to be liberally construed to further the legislative objective of reducing the hardship of unemployment. (See, e.g., Gibson v. Unemployment Insurance Appeals Board (1973), 9 Cal. 3d 494, 108 Cal. Rptr. 1) The administrative law judge correctly observed that because the claimant's wage credits were based on part-time employment, and her weekly benefit was already reduced because of that fact, application of section 1253.5 to further reduce her benefits would be inequitable and contrary to the design of the unemployment insurance system.

In Appeals Board Decision No. P-B-172, we held that a claimant unable to work more than five hours per day for reasons of health, and whose claim was based on wages earned in such limited employment, was not unavailable for work within the meaning of section 1253(c) of the code if there was a labor market in which there were reasonable prospects that the claimant could obtain the type of work she sought. Although the present claimant's availability for work under section 1253(c) is not disputed, the facts and rationale of Appeals Board Decision No. P-B-172 are clearly analogous to those in the present case and support the conclusion that the claimant is not ineligible for benefits under section 1253.5.

We find, therefore, that section 1253.5 was inappropriately applied to reduce the benefits payable to the claimant for the week ending July 1, 1978.

DECISION

The decision of the administrative law judge is modified, and as modified, is affirmed. The claimant was entitled to her full weekly benefit of \$69, but for the week ending July 1, 1978, rather than for the two weeks ending on that date.

Sacramento, California, November 27, 1979.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

HERBERT RHODES

LORETTA A. WALKER

Dissenting - Written Opinion Attached

HARRY K. GRAFE

DISSENTING OPINION

I dissent. As I will demonstrate, infra, the majority opinion is founded on fallacy, ignores established rules and precedents, and compels a conclusion 180 degrees removed from the result erroneously assumed by my colleagues.

The general rule which permeates any question of payment of unemployment insurance benefits is that such compensation is payable to persons unemployed through no fault of their own (Unemployment Insurance Code section 100). To this general rule the Legislature has appended a variety of limitations and conditions. Perhaps the most pervasive of these limitations are the provisions of subdivision (c) of section 1253, which provide that an unemployed person is eligible to receive unemployment insurance benefits "with respect to any week only if" such person "was able to work and available for work for that week." (Emphasis added.) A proper analysis of any question of entitlement to unemployment insurance benefits, as practiced by the personnel of the Employment Development Department in thousands of cases each year, is to ascertain whether the claimant is unemployed without fault, and if so, whether the claimant is eligible for each week he or she is claiming benefits. Thus, the week-by-week question of eligibility is a limitation on the general rule of entitlement to benefits.

The provisions of subdivision (c) of section 1253 have been identically interpreted both by Precedent Decisions of this Board and by formal opinion of the Attorney General. In Precedent Benefit Decision No. P-B-17, this Board held:

"In order to meet the eligibility requirements of section 1253(c) of the code a claimant must be able to work and available for work for each day during the claimant's normal workweek, and inability to work during any workday renders a claimant ineligible for benefits for the entire week." (Emphasis added.)

In 10 Ops. Atty. Gen. 208, the California Attorney General reached the identical result 21 years before the Board issued Precedent Benefit Decision No. P-B-17.

There, the Attorney General announced the position that subdivision (c) of section 1253 means a claimant must be able to and available for work for the entire week in which benefits are claimed. Seven years later, 24 Ops. Atty. Gen. 81 was written in response to a Department plea for modification of the strict interpretation issued in the 1947 opinion. In 1954, the Department explained to the Attorney General that the strict interpretation was causing hardship to claimants who were unable to work one day or unavailable for work one day of the week because of "compelling circumstances." The Department asked the Attorney General to retreat from the strict interpretation set forth in 10 Ops. Atty. Gen. 208 (Op. 47-221). The Attorney General refused, reiterating the articulation of the strict interpretation, based on the following reasons and analysis:

"We have reexamined the authorities cited in Opinion 47-221 to the effect that the preposition 'for' when used in a clause relating to a period of time means 'during,' 'throughout' or 'during the continuance of' such period of time, and we are unable to find any basis upon which the conclusion reached in Opinion 47-221 can be revised. (See City of Lindsay v. Mack (1911), 160 Cal. 647; Hanson v. Goldsmith (1915), 170 Cal. 512.)

"Moreover, the suggestion by the Department that a claimant be held eligible for benefits for a week in which for 'compelling reasons' he has been unavailable for one normal work day or less will not bear analysis in the light of the statute.

"Apart from the eligibility requirements of the law, an individual cannot be paid unemployment insurance benefits if he is subject to 'disqualification' for any one of several reasons. One type of 'disqualification' is the refusal of suitable employment 'without good cause.' (Section 1257(b), Unemployment Insurance Code.) Thus, for example, a claimant who refuses suitable work because he is taking care of a sick wife ordinarily will not be disqualified because he has 'good cause' for the refusal, but he is not eligible for benefits because he is not 'available' (see Altman, Availability for Work (1950) 85). Another type of 'disqualification' is the leaving of most recent work voluntarily 'without good cause.' (Section 1256, Unemployment Insurance Code.)

"To accept the suggested test of 'compelling circumstances' in determining eligibility, accordingly, would be to add administratively the phrase 'without good cause' to section 1253(c), which the Legislature, apparently with deliberation, did not include in that section because it did incorporate the phrase in sections 1256 and 1257(b).

"In any event, if it be assumed that the test of 'compelling circumstances' properly could be applied to 'availability,' there is no justification in limiting its application to one day. There would appear to be no rationale basis upon which, for example, benefits for a week would be allowed to an individual who was quarantined for one day because of a contagious disease, but benefits would be denied for the week if he were confined for a day and a half, two days or three days. It is of interest in this regard to note that the laws of some states specifically provide a solution for the problem presented. Thus, in Illinois and Indiana the weekly benefit is reduced by one-third for each normal work day of unavailability for work; in Minnesota the weekly benefit amount is reduced one-fifth for each day of unavailability for work, and in Washington the weekly benefit amount may be reduced by one-seventh for each day of unavailability for work. The Legislature of this State, however, has not seen fit to allow benefits based on partial availability for a week." (24 Ops. Atty. Gen. 81, at 82-83)

It is noteworthy (and somewhat prophetic in view of the last quoted paragraph) that such strict interpretation has been continuously followed for 32 years by the Department, this Board, the courts, and the Legislature. The latter branch of government has, over the years, enacted exculpatory and ameliorative provisions to lessen the impact of the limitation contained in subdivision (c) of section 1253. The liberalizing provision with which we are concerned in the present case is section 1253.5, which was enacted in 1974 (operative January 1, 1975), and provides as follows:

"Notwithstanding the provisions of subdivision (c) of Section 1253, if an individual is, in all other respects, eligible for benefits under this part, and such individual

becomes unable to work due to a physical or mental illness or injury for one or more days during such week, he shall be paid unemployment compensation benefits at the rate of one-seventh the weekly benefit amount payable for that week for each day which he is available for work and able to work. The amount of benefits payable, if not a multiple of one dollar (\$1), shall be computed to the next higher multiple of one dollar (\$1). The individual shall not be entitled to unemployment compensation benefits for any day during such week which he is unable to work due to such physical or mental illness or injury."

That section 1253.5 is an exception to the limitation on eligibility contained in subdivision (c) of section 1253 is clear from the first ("notwithstanding") phrase of section 1253.5. It is obvious that a claimant, who is able to work and available for work each day of the week in which he or she claims benefits, cannot be denied unemployment compensation by reason of subdivision (c) of section 1253. On the other hand, a claimant, who is not able to work and available for work on one or more days of the week in which benefits are claimed, must be denied unemployment insurance compensation by reason of the provisions of subdivision (c) of section 1253 (Precedent Benefit Decision No. P-B-17; 10 Ops. Atty. Gen. 208; 24 Ops. Atty. Gen. 81) - unless there is a statutory exception to the limitation on eligibility set forth in subdivision (c) of section 1253. That is the precise issue which is before the Board in the present case.

The majority opinion states, at the bottom of page 1 and the top of page 2, that the Department determined the claimant was able and available within the meaning of subdivision (c) of section 1253. The record before us simply will not support such an assertion. In fact, the Department made no express determination regarding subdivision (c) of section 1253. Legally, none was necessary as, by implication, had the claimant been able to work and available for work each day of the week, benefits would not have been denied under subdivision (c) of section 1253. Conversely, the provisions of section 1253.5 only come into play if the claimant would otherwise be ineligible pursuant to subdivision (c) of section 1253 by reason of her inability to work or unavailability for work each day of the week. This was recognized by the Oakland Office of Appeals in its issuance of the Notice of Hearing in this matter, which

correctly set forth subdivision (c) of section 1253 and section 1253.5 as both being in issue.

To correctly place the Department's position in perspective, the Department is not contending the claimant is ineligible for any benefits, but rather that the claimant is only eligible for three-sevenths of her weekly benefit amount, and this is so only by reason of the provisions of section 1253.5. Yet, it necessarily follows that if the claimant does not come within the provisions of section 1253.5, conversely the claimant must be ineligible for any benefits, as she is indisputably not able to work each day of the week (subdivision (c) of section 1253; Precedent Benefit Decision No. P-B-17; 10 Ops. Atty. Gen. 208; 24 Ops. Atty. Gen. 81).

The majority opinion refers to several rules of statutory construction as asserted aids to the majority position. In so doing, however, the majority overlook an overwhelming number of rules which mandate a conclusion diametrically opposite the majority position. But even before entering the thicket of statutory construction, judges and quasi-judicial bodies must adhere to the cautionary instruction reiterated in a recent California case: "The role of the courts is not to legislate or to rewrite the law, but to interpret what is before them (Code of Civil Procedure section 1858; Estate of Tkachuk, 73 Cal. App. 3d 14; People v. White, 122 Cal. App. 2d 551); Fair v. Fountain Valley School District (1979), 90 Cal. App. 3d 180, at 187." Stated another way, it is the function of the courts and quasi-judicial bodies to declare the law and not to make it (Treppa v. Justice's Court (1934), 1 Cal. App. 2d 374). Under the pretense of statutory construction, a court or quasi-judicial body is not to rewrite the law (People v. Pacific Guano Company (1942), 55 Cal. App. 2d 845). Courts and quasi-judicial bodies must declare and enforce a statute as it is enacted (Mills v. LaVerne Land Company, 97 Cal. 254). They have no power of legislation (Crocker National Bank v. Byrne and McConnell, 178 Cal. 329), and cannot substitute their ideas for those expressed by the Legislature (Smith v. Ibos (1937), 22 Cal. App. 2d 551). The fact that a court or quasi-judicial body may not agree with the wisdom of a statute or that it doubts the enactment's beneficial character does not justify the ignoring of plain and unambiguous language (Estate of Carter (1935), 9 Cal. App. 2d 714).

It is elementary that the rules of statutory construction are applicable only where the statutory language is uncertain and ambiguous (Scott v. McPheeters

(1939), 33 Cal. App. 2d 629). Where the meaning of a statute is plain, its language is clear and unambiguous, and there is no uncertainty or doubt of legislative intent, there is no need for interpretation by a court or quasi-judicial body (Caminetti v. Pacific Mutual Life Insurance Company (1943), 22 Cal. 2d 344). The court or quasi-judicial body must then follow the language used and give to the statute its plain meaning, irrespective of what the reviewing tribunal may think of the wisdom, expediency, or policy of the enactment (Bourland v. Hildreth, 26 Cal. 161; Smith v. Union Oil Company, 166 Cal. 217). The court or quasi-judicial body is not permitted to speculate that the Legislature meant something other than what it said (Bakersfield Home Building Company v. McAlpine Land & Development Company (1938), 26 Cal. App. 2d 444). Nor may a court or quasi-judicial body rewrite a statute to make it express an intention not expressed therein (Gordon v. Los Angeles (1944), 63 Cal. App. 2d 312).

In truth and in fact, section 1253.5 is neither uncertain nor ambiguous, and thus there is no reason to resort to the principles of statutory construction. In keeping with the authorities cited, supra, this Board should accept and apply the statute as written. The majority attempt to manufacture an uncertainty or ambiguity by seizing on the Legislature's use of the word "becomes" in section 1253.5. In so doing, however, the majority lift that word out of context and ascribe to it a meaning and significance not evidenced by the Legislature's intent when the enactment is read as a whole. And by that bootstrapping device, the majority have openly violated the judicially-declared mandates listed above.

Plainly, there is no hint or intimation on the face of section 1253.5 that the Legislature intended persons with "chronic" conditions to be considered differently than persons with a non-chronic physical or mental illness or injury. In effect, the majority have rewritten the statute to make it express an intention not expressed therein, which is an overreach of this Board's power and authority (Gordon v. Los Angeles, supra). Moreover, the majority's self-annointed amendment of section 1253.5 is itself imperfect and creates uncertainty and ambiguity. What is a "chronic" condition? At what point does a physical or mental illness or injury become "chronic"? What is the rationale for differentiating between a claimant with a "chronic" condition and a claimant who must receive life-sustaining hemodialysis every fourth day, which renders such claimant unable to work or seek

work on such days? Where does the majority's interpretation leave the claimant whose condition is stationary, but temporary, and who must be incapacitated one day each week for treatment and therapy?

I submit that all the above examples - including the claimant with a "chronic" condition - fall within the purview of section 1253.5, as that statute has been written by the Legislature. There is no legitimate legal basis to twist or torture the plain language utilized by the Legislature, so as to confect some result plainly not contemplated by the Legislature and different than the ambit of coverage clearly intended by the Legislature (Bourland v. Hilldreth, supra). There is simply no legal support for the arbitrary construction of section 1253.5 adopted by the majority.

Moreover, the majority incorrectly classify section 1253.5 as "a limitation upon" subdivision (c) of section 1253 (page 3 of majority opinion, emphasis added). As was demonstrated earlier, subdivision (c) of section 1253 is itself a limitation on an otherwise qualified claimant's entitlement to unemployment insurance benefits. Actually, section 1253.5 is a liberalization of the otherwise disentitling effect of subdivision (c) of section 1253 as to those claimants who are not able or available for work each day of the week "due to a physical or mental illness or injury for one or more days during such week," but who are able and available for one or more days. But for the ameliorative provisions of section 1253.5, such persons would be ineligible for the entire week, pursuant to subdivision (c) of section 1253.

The majority seek to justify their construction of section 1253.5 by reference to Gibson v. Unemployment Insurance Appeals Board ((1973), 9 Cal. 3d 494), but that case provides no support for the result they have reached. Gibson concerned the interpretation of the words "good cause" as applied to the filing of untimely appeals from adverse determinations by the Department. As was clearly spelled out by the Attorney General in his analysis of subdivision (c) of section 1253 (24 Ops. Atty. Gen. 81, at 82-83, set out supra), the Legislature did not include any "good cause" provision in subdivision (c), and the Board and the Department have no authority to add those words by administrative fiat. Likewise, it is plain from the face of the statute that the Legislature expressly omitted from section 1253.5 the inclusion of any "good cause" provision. Thus, Gibson is not apropos to the matter at hand.

The majority endorse the administrative law judge's theory that, as the claimant here acquired wage credits for unemployment insurance purposes on the basis of part-time employment, once she became unemployed she should receive unemployment insurance compensation calculated in accordance with her part-time employment and without any further reduction. To be sure, that theory is novel; however, it finds support nowhere in the Unemployment Insurance Code. Moreover, if it was a viable principle of unemployment insurance law, there would have been no need for the Legislature to have enacted section 1253.5, as the same effect could have been reached by application of the administrative law judge's theory. As it may not be presumed that the Legislature engaged in an idle or needless act in its passage of section 1253.5 (San Joaquin and Kings River Canal and Irrigation Company v. Stevenson, 164 Cal. 221), then a fortiori the theory can carry no legal weight.

In addition, my colleagues seek support from Precedent Benefit Decision No. P-B-172, but that decision affords no substantiation for the majority opinion in this case. This Board in P-B-172 held only that an unemployed claimant who is able to work more than half of each day was able to and available for work each day of the week, and thus was not ineligible under subdivision (c) of section 1253 as said subdivision had been interpreted in P-B-17 (see, in accord, 10 Ops. Atty. Gen. 208, 24 Ops. Atty. Gen. 81, supra). Plainly, there is nothing in P-B-172 which is analogous to the present case. In the matter now before us, it is undisputed that the claimant is unable to work more than three days per week. If that set of facts was analogous to the circumstances in P-B-172, again, there would have been no useful purpose to be served by the Legislature's enactment of section 1253.5. However, as is clear from P-B-17, 10 Ops. Atty. Gen. 208, 24 Ops. Atty. Gen. 81, and 32 years of consistent, conforming application, the facts here are inapposite to P-B-172 and said precedent can only stand for the result that a claimant in the unfortunate straits as the present claimant is ineligible for unemployment insurance benefits by reason of subdivision (c) of section 1253, and if entitled to unemployment insurance compensation, can be so only because of the ameliorative provisions of section 1253.5. I submit that such is the result compelled, once the problem is approached syllogistically rather than as a subject for omphaloskepsis.

In summary, unless or until the Legislature makes further change in the statutes, a person like the claimant here, who is unable to work one or more days per week as the result of illness or injury, is ineligible for unemployment insurance compensation by reason of the provisions of subdivision (c) of section 1253, and is eligible

for such benefits for the number of days the claimant is able to work - but only by reason of the provisions of section 1253.5. And if, as the majority hold, such claimant is to be excluded from the ambit of section 1253.5, then the claimant is not eligible for any benefits for that week. Such is the present state of the law.

HARRY K. GRAFE